Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00228/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 February 2014	**On 4 August 2014**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SS

Respondent

Representation:

For the Appellant (Secretary of State): Mr C Avery, Home Office Presenting Officer
For the Respondent (Mr S): Ms V Easty, Counsel, instructed by Ravi Sethi Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a decision of a panel of the First-tier Tribunal (First-tier Tribunal Judge Canavan and Mrs A J F Cross de Chavannes) which, in a determination promulgated on 11 June 2013, had allowed Mr S's appeal against the Secretary of State's decision to deport

him under Section 32(5) of the UK Borders Act 2007. For ease of convenience, I shall throughout this determination refer to the Secretary of State (who ws the original respondent) as "the Secretary of State" and to Mr S who was the original appellant, as "the claimant".

2. The claimant, who was born on 17 August 1972, is a citizen of Mauritius. His immigration history is disputed, but the contentions of both parties are summarised at paragraphs 3 to 7 of the panel's determination as follows:

"Background

3. The central issue in this appeal is the appellant's immigration history. There is some dispute between the parties as to whether the appellant was granted certain periods of leave to remain, and in particular, whether he was naturalised as a British citizen in 1999 and therefore is not even liable to deportation.

4. The appellant first entered the UK on 20 May 1991 (aged 19 years old) with entry clearance as a student that was valid until 31 October 1992. It is accepted that he applied to extend his visa on several occasions thereafter until 30 July 2006 [this should presumably have read 1997]. The respondent's summary of his immigration history (PF1) accepts that he was granted leave to remain until 30 July 1996 but goes on to state that there was evidence to show that he left the UK in August 1995 to visit Mauritius. In September 1995 he left Mauritius but there was said to be no record of him having re-entered the UK. However, a copy of the appellant's old passport, which was issued on 04 October 1990 (pg.D1-6 respondent's bundle "RB") does show a UK re-entry stamp from an immigration officer in Dover on 22 October 1995 (pg.D3).

5. The appellant says that he applied for further leave to remain and then for Indefinite Leave to Remain (ILR), which was granted to him in 2007 [this should also presumably have read 1997]. The copy of the appellant's passport that was issued in 1990 does not state how long it was valid for but normally one might expect a passport to be valid for either five or ten years. There is no evidence in that passport to show that he was granted ILR in 2007 [again the panel presumably meant to record 1997] as claimed. The appellant says that new passports started to be issued in Mauritius which had 'technology in the passport' so he had applied for a new passport. It was that passport that he says had the ILR endorsement in it. The passport issued in 1990 is stamped as 'cancelled' but does not state the date when this was done.

6. The appellant says that he no longer has that passport or any other evidence to show that he was granted ILR in 2007 [again the panel must have intended to say 1997]. He says that he was naturalised as a British citizen in 1999 but did not obtain a British passport. The appellant claims that he lost the passport with the ILR endorsement and his naturalisation certificate when he moved house in late 1999. He wanted to travel to Mauritius for a visit but realised that he didn't have the passport. The appellant and his wife say that they both went to the Home Office in Croydon to see whether he could have his ILR reinstated or be issued with a new naturalisation certificate but they

were told that the file had been sent to Liverpool, and despite further enquiries being made, no records could be found. Both witnesses say that they were advised by a solicitor that it could take some time to sort the problem out and if he wanted to travel it would be quicker for him to apply for leave to remain as a spouse on a new Mauritian passport. The couple had married on 04 March 2000.

7. The appellant applied for a new Mauritian passport, which was issued on 01 August 2000 (pg.E1 RB). He applied for leave to remain as a spouse in November 2000 but no mention was made in that application to his claim to already have ILR or to have been naturalised as a British citizen. The appellant was granted leave to remain until 20 March 2002. He then applied for ILR as a spouse, which was granted on 19 March 2002. Once again no mention was made in that application of the fact that the appellant had already previously been granted ILR or naturalised."

3. As the panel notes at paragraph 8 of its determination, the claimant was convicted of two offences (which the panel referred to as "fairly minor offences") for which he did not receive custodial sentences. In April 1993, which was less than two years after he had arrived in this country, he was given concurrent community sentences of 80 hours for offences of obtaining property by deception, theft and handling. Then in April 1998, he was convicted of shoplifting, and conditionally discharged for 24 months.

4. Then, on 30 May 2003, he was sentenced to fifteen years' imprisonment for what was an extremely serious offence indeed. He was convicted after a trial of "possession of drugs the import of which is prohibited – class A drugs" for which he was sentenced to fifteen years' imprisonment. The conviction related to the importation of 8.09 kilogrammes of cocaine between 29 January 2002 and 16 May 2002, and it is clear from the judge's sentencing remarks that the claimant was a principal organiser of this extremely serious offence. The judge's sentencing remarks in respect of the claimant were as follows:

> "You, [JS], were shown, on the evidence before the jury, to have been the effective controller of this importation; having worked airside at London Heathrow Airport in the past, you had a clear understanding of where a weakness could be found in the customs controls. You were closely involved with Plummer during a period which must have been the planning phase of this enterprise, a period of a number of weeks. During the critical days and hours when Rutty was moving this consignment of cocaine, you, [S], exercised control over the key participants in this importation: you supervised your contact airside at London Heathrow Airport, with whom you were in frequent communication; you ensured the successful smuggling while Plummer was close by, awaiting the completion of the enterprise.
>
> In all the circumstances of this case, I must sentence you, [S], as a principal organiser and active participant at each important stage of the criminal plan."

5. The judge did not make a deportation recommendation, from which the panel inferred (at paragraph 29) that “it does seem to have been accepted that the appellant was likely to have been a British citizen when he was sentenced in 2003" but all one can say with any certainty from the judge's sentencing remarks is that this issue was not considered at that time.

6. It appears that an OASys assessment was carried out on 28 July 2006 which assessed the claimant as presenting a low risk of reconviction (even though he continued to deny the offence) following which he was moved to an open prison from where he was released on licence in 2010.

7. Thereafter, no steps were taken to deport the claimant until on 15 February 2011 he made an application for a “no time limit” stamp to be placed in his new passport to confirm what he claimed was his previous grant of indefinite leave to remain. As recorded by the panel at paragraph 12 of its determination, no action was taken in response until his local MP became involved in the case, but then on 31 October 2012 the Secretary of State wrote to the claimant to notify him of his liability to deportation. The claimant replied by asserting now that he was a British citizen, although, as the panel records, he had no evidence to confirm that fact. The Secretary of State’s position was that there were no records to show that he had been naturalised as he now claimed.

8. Thereafter, on 16 January 2013, the Secretary of State made a decision to deport the claimant. It is stated in the decision letter that under Section 32(5) of the UK Borders Act 2007, the Secretary of State must make a deportation order in respect of a foreign national who has been convicted in the United Kingdom of an offence and who has been sentenced to a period of imprisonment of at least twelve months, unless that foreign national falls within one of the exceptions set out in Section 33 of that Act. The Secretary of State did not accept that the deportation of the claimant would be in breach of his Article 8 rights; although it was accepted that his deportation would interfere with his rights and also that it “may not be in the best interests of your children”, nonetheless the Secretary of State considered that the decision was necessary for the legitimate purpose of the prevention of disorder and crime and that this purpose outweighed the countervailing factors. In reaching her decision, the Secretary of State had in mind the provisions of paragraphs 398, 399 and 399A of the Immigration Rules and also the provisions of Section 55 of the Borders, Citizenship and Immigration Act 2009, which required her to consider the interests of the claimant’s children as a primary consideration.

9. The Secretary of State also gave consideration to the claimant’s claim that he had been naturalised as a British citizen in 1999, but in the absence of any documentary evidence confirming this and also having searched her own records, she did not accept that this was the case. Even though the Secretary of State accepted that there had been a delay in informing the claimant of his liability to deportation, nonetheless it was considered that the public interest in his deportation outweighed his right

to family and/or private life such that his deportation would not breach Article 8 of the ECHR.

10. The claimant appealed against this decision and there were essentially two issues before the panel. The first, central issue was whether or not the claimant was indeed a naturalised British citizen, as he claimed, because if he was, then it was accepted that he could not be deported. The second issue was whether, in any event, the claimant's decision to deport him was disproportionate, such that it was in breach of his Article 8 rights. If it was, then by virtue of Section 33(2)(a) of the 2007 Act, Section 32(4) would not apply because his deportation would breach one of his Convention rights.

11. As already noted above, following the hearing before the panel, the panel found, on the balance of probabilities, that the claimant was indeed a naturalised British citizen, as he had claimed. It also found that his deportation would be in breach of his Article 8 rights, although it is clear from its determination that this finding was dependent on the finding that the claimant was a British citizen. This is clear from what was said at paragraph 44 of its determination, as follows:

> "44. It might well be that if the appellant was relying on his family life alone that the very serious nature of the offence for which he has been convicted might still outweigh the weight to be given to the best interests of the children. However, in this case we also find that the evidence that shows that he is likely to have been naturalised as a British citizen is the factor that tips the balance in favour of the appellant."

12. The Secretary of State has appealed against this decision, and was granted permission to appeal by Upper Tribunal Judge Dawson on 2 August 2013.

13. This appeal then came before Upper Tribunal Judge McKee sitting at Field House on 14 November 2013. Having heard submissions on behalf of both parties, Judge McKee set aside the determination of the First-tier Tribunal as containing a material error of law and directed that the decision on the appeal was to be re-made by the Upper Tribunal.

14. Judge McKee's reasons for so deciding are set out in his "Decision and Directions" which document is dated the same date as the hearing, which I now set out:

> "1. The Secretary of State appeals, with leave granted on 2nd August 2013 by Judge Dawson, against the determination of the First-tier Tribunal, allowing the appeal of Mr SS against a deportation order made under s.32(5) of the UK Borders Act 2007 on 15th January 2013. After a hearing on 20th May 2013 a panel comprising Judge Canavan and Mrs Cross de Chavannes found it to be more likely than not that Mr SS is a British citizen, and hence not liable to deportation. They went on to consider the appeal on an 'even if' basis under Article 8, and found that, although the very serious nature of his offence (he was sentenced to 15 years' imprisonment for the importation of Class A drugs) might otherwise have

outweighed the best interests of his children, the likelihood of his having been naturalised as a British citizen tipped the proportionality balance in his favour.

2. Mr SS has no direct evidence to confirm his claim to be a British citizen. He has two Mauritian passports, one issued in 1990, apparently valid for ten years, the other issued in 2000, and saying on its face that it was valid for ten years. The former has stamps showing successive grants of first leave to enter and then leave to remain as a student between May 1991 and July 1996, although there is a curious middle period when Mr SS was apparently given leave to remain with no conditions attached at all. There is a stamp showing leave to remain from December 1993 to December 1995, followed by a further grant of unconditional leave between May and September 1994. Not only is the latter grant ostensibly redundant, but it was apparently granted by the same official, P. Winston. Then there is a grant of student leave from September 1994 to August 1995, which again would be unnecessary if Mr SS already had leave until December 1995. Finally comes a grant of student leave from August 1995 to July 1996. It was after this last date, in 1997, that Mr SS claims to have been granted indefinite leave to remain, but there is no stamp for that in the passport issued in 1990. He had, says Mr SS, applied for a new passport, although his old one had not expired, and it was this new passport which bore the indefinite leave stamp.

3. The grant of settlement led naturally to an application for naturalisation, which was granted in 1999. But later that year both the new passport and the naturalisation certificate were lost when - says Mr SS - he moved house. He also says that the documents were in a briefcase which was impounded by HM Customs & Excise after he was arrested for importing drugs in 2002. At all events, the First-tier Tribunal had to determine whether, despite the absence of these documents, and the absence of any current record at the Home Office that indefinite leave or naturalisation had ever been granted, Mr SS really was a British citizen. At paragraphs 24-25 of their determination, the panel list factors pointing away from the likelihood of this claim. But at paragraph 26 they say that "*there are other pieces of evidence before us that support the appellant's account*." The first of these, at paragraph 27, is that the chronology given by the appellant is "*at least consistent with someone who might have been eligible to apply for ILR and then naturalisation. The appellant had leave to remain in the UK from 1991 to 1996 and it is therefore possible that he could have accrued sufficient time in the UK to make an application for ILR by 2007 (sic* - 1997 is intended*)*."

4. The panel went on to find that Mr SS was indeed, on a balance of probabilities, a British citizen, and the Secretary of State's challenge is essentially that they did not give adequate reasons for this conclusion. The observation made at paragraph 27 is criticised as being "*entirely speculative*." When the matter came before me today, I put it to the representatives that there was indeed something badly wrong with paragraph 27. Examination of the stamps in the 1990 passport shows unexplained overlaps in the grants of leave. It also shows that most of the leave granted to Mr SS, including the last period of leave, was as a student. The student route has never led to indefinite leave under the Immigration Rules, unless a student manages to 'clock up' ten continuous years of study.

5. Mr O'Ceallaigh submits that this point was not made in the grounds for seeking leave to appeal, and was not a '*Robinson* obvious' point which the panel should have picked up for themselves. I disagree. As a specialist tribunal, the

panel should have been aware that the leave granted to Mr SS would not normally have made him eligible for settlement. This called for further inquiry into how it was that Mr SS obtained indefinite leave. The panel's acceptance without more that this was perfectly possible could indeed be characterised as "*entirely speculative*."

6. It was an error of law for the panel to assume that the entries in Mr SS's passport supported his contention that he was granted indefinite leave in 1997. This was the first of the reasons given by the panel for accepting that Mr SS is a British citizen, and was plainly material to the outcome of the appeal. But Mr O'Ceallaigh was quite right to contend that his client was not in a position to address the point today, it not having been particularised in this way in the Grounds of Appeal. An adjournment would clearly be needed before the decision on the appeal could be re-made by the Upper Tribunal, and enough time would need to be given so that both sides could try to obtain any further evidence that might shed light on the nationality question.

7. As for Article 8, Mr O'Ceallaigh readily accepted that there was a logical flaw in the panel using his client's British nationality to tip the proportionality balance in his favour. If Mr SS is British, he cannot be deported. It is only if he is not British that he has to rely on Article 8. So there too the panel fell into error.

DECISION

The determination of the First-tier Tribunal is set aside, and the decision on the appeal is to be re-made by the Upper Tribunal."

15. Although in the normal course of events the resumed hearing would have again come before Judge McKee, since making this decision, Judge McKee retired and accordingly a transfer order has been made, which is how this appeal has come before me.

The Hearing

16. During the course of the hearing, I heard submissions on behalf of both parties and also heard evidence from the claimant and his wife, who were both cross-examined. I recorded the evidence and the submissions contemporaneously, and my notes are contained within the Record of Proceedings. Accordingly, I shall not set out below everything which was said to me during the course of the hearing, but shall refer only to such of the evidence and submissions as is necessary for the purposes of this determination. However, I have had regard to everything which was said to me, as well as to all the documents contained within the file, whether or not the same is specifically set out below. Regrettably, after I had reached my decision but before I had written my determination, the file was mislaid, but having found it again and having read through the detailed Record of Proceedings which I made, I am entirely confident that notwithstanding the period which has elapsed since the hearing, the submissions and evidence remain clearly in my mind.

17. At the outset, Ms Easty submitted on behalf of the claimant that Judge McKee should not have found that there had been an error of law in the

panel's determination, and had been wrong to consider that successive grants of leave would not have amounted to a proper basis on which the claimant could have been granted indefinite leave to remain, because he had looked at this on the basis of the claimant being a student as opposed to a commonwealth student who was ordinarily resident in this country. Also, it was submitted that Judge McKee had not made any decision as to what findings of fact should be retained.

18. On behalf of the Secretary of State, Mr Avery submitted that the judge's finding that there had been an error of law in the determination was properly open to him for the reasons he gave, and that the only appropriate way of proceeding with the hearing was for this Tribunal now to consider the evidence afresh.

19. In my judgment, Judge McKee's decision is adequately reasoned and was open to him. In light of his decision, I agree with Mr Avery that the only appropriate course for this Tribunal now to take was to consider the evidence afresh.

20. The claimant gave evidence and adopted the statement he had made on 14 May 2013, which is at pages 1 to 3 of the bundle which had been before the First-tier Tribunal. In this statement he describes how he had come to the UK in 1991 for further studies after completion of his A levels in Mauritius and then at paragraph 4, he states as follows:

> "4. I was granted ILR in 1997 and I received my Naturalisation Certificate in 1999. At present I do not have any documents to prove as HM Customs and Excise are holding everything they took from my house after my arrest in 2002." (That was in respect of the drugs offence for which he received the custodial sentence of fifteen years).

21. He states at paragraph 5 that: "whilst I was in custody I was asked about my nationality and the Home Office confirmed on several occasions that I was a British citizen". He contends that "they could not have relied on my assertion that I was British and they must have verified it within their departments".

22. He still denies the offence of which he was convicted and he gives evidence as to the harmful effect there would be on both himself and his children if they were to be separated. Then, at paragraph 15 onwards, he states further with regard to whether or not he is a British citizen as follows:

> "15. For the UKBA to now say that I am not a British citizen beggars belief. They were the ones to confirm that I was British. They did not just believe me but they did their checks. I was only released because I was British. Otherwise there is no basis they would have released me. When I was arrested Customs and Excise took all my documents which I had kept in a briefcase.
>
> 16. They never returned the documents despite the fact that I had written to them through my solicitors. A Mr Lakhampaul from the Customs had

> taken the documents but never returned them. All my important documents including my naturalisation certificate was in the briefcase. I had also written to the UKBA myself in December 2012 to inform them of the same."

23. In cross-examination, the claimant was asked what had been the basis of his application for indefinite leave to remain in 1997, to which he replied that he had sent it to his solicitor to renew the work permit he had "and after a while my solicitor informed me I had received ILR". He had been a student but he had a work permit at the same time.

24. In his statement, the claimant had said (at paragraph 3) that after coming to the UK in 1991 for further studies he had "applied for a working holidaymaker visa, which I was granted for two years". He stated that he was entitled to such a visa as he had come from a commonwealth country and that he started working part-time while carrying on with further studies (which included completing his MBA and graduating with a further diploma in marketing). The claimant said in cross-examination that he had started at the Jewish Care Home when he received "my work permit" in 1993, and that he had finished his MBA in 1996. He was asked whether he actually had a document called a "work permit" or whether this was just part of his studies, to which he replied that there was no restriction on taking paid employment in the UK.

25. Mr Avery suggested on the basis of the documents that he had seen that the claimant had had leave to remain as a student in which capacity he was allowed to carry out some work, at which point Ms Easty made reference to the relevant section in the 1995 edition of Macdonald which suggested that at that time a student would need the consent of the Department of Employment to work. There did not appear to be any entry in his passport to show that he needed any permission other than the permission of the Department of Employment.

26. The reason why Mr Avery sought to seek clarification on this issue was because the claimant had said that he had a letter stating that he could seek employment which would not be in accordance with what was said in his passport. The claimant then said that he had "received a work permit".

27. The claimant when asked then clarified that it was his evidence that he had initially come in 1991 for further studies but that he had then stayed on as a working holidaymaker from 1993. Mr Avery then referred to the entry on the claimant's old passport which suggested that on 20 December 1993 he had been granted permission to remain as a working holidaymaker for two years, with no restrictions on employment.

28. The claimant was asked whether it was right then to say that he did not know on what basis he had been granted indefinite leave to remain, to which he replied that "I wanted to stay after graduation and my solicitor sent off my passport and told me I had got ILR". The claimant continued

by saying that "I wanted to have more work permit in 1996 when my visa was ending".

29. He was asked again whether it was right that he did not know the basis upon which his solicitor was applying for him to which the claimant replied that the basis was to work as a chef in a care home.

30. The claimant was then asked whether it was correct that he did not have any evidence that he had been granted indefinite leave to remain, to which he replied, "not at present. My passport was lost". When he was asked when this was, he said that it was when he moved house from Barnet to Hounslow in late 1999. The claimant, who had made a fresh application for indefinite leave to remain as a spouse after the date on which he now claims he had been naturalised as a British citizen was asked whether he had any evidence from the Mauritian authorities that he had been provided with a new passport to replace the one which he claimed had been lost (which passport was relied upon in his later application for indefinite leave to remain and which did not contain within it any reference to his having previously been granted indefinite leave to remain) to which he replied that he did not. When he was asked why that was, the claimant replied that he had returned to the Mauritian High Commission but was "still awaiting their reply. I wrote to them in November last year".

31. When asked by the Tribunal whether he had a copy of that letter he had written, he said "not on me now, no. I did write to places where I worked".

32. The claimant did not dispute when asked by Mr Avery that he did not have any evidence that he had had a passport between the time he had entered and the time he had made his (later) application for indefinite leave to remain on the basis of his marriage. He was asked whether he had been back to the solicitor who had represented him when he had applied for ILR originally, and he said that he had been told that the person dealing with this had passed away and the firm did not keep records more than ten years. He was asked the name of the firm and he said it was JR Immigration, which was based in Brixton. He confirmed that his evidence was that he had been granted ILR in 1997, and had then made a subsequent application for leave to remain on the basis of his marriage in 2001.

33. Mr Avery asked him why as he must have known at that time that he was missing the necessary paperwork he did not seek this evidence from his former solicitors then, to which the claimant replied that he had and had applied for a new passport, his third passport. His first passport was an old style passport which was valid for five years, then the passport he lost which he had obtained in 1996 was a ten year passport.

34. The claimant said that he had taken his new passport to the Home Office to reinstate his indefinite leave to remain, but when asked whether he had any correspondence with the Home Office at that time he replied that he

did not, because he had just walked in there. He needed the passport to travel and he was told that they could not find any documents in the Home Office.

35. The claimant was then asked why in that case he had not gone back then to the solicitors who had dealt with his application previously, to which he replied that he had gone to Malik Solicitors in East London who had advised him that they would take the case and sue the Home Office for losing his documents. He did not act on this advice because they had wanted a large sum of money to fight the case, and also because by that time his wife had started to work for the Home Office and so it would have been difficult to start a case to expose them.

36. When asked again why in the circumstances he had not gone back to his old solicitors to see if they had any record of his application and subsequent grant of ILR, the claimant then said that he could not get hold of the person who had been dealing with his case before at JR Immigration.

37. In further questioning, the claimant said that he had applied for a British passport in 2000, although he did not have the exact date, and he did not have any documents because "all documents were taken by Customs and Excise". When asked, he said that he had used a different solicitor from the solicitor he had used to make his application for naturalisation, whose name was something like Stephen Sanbor "something like that".

38. When asked when he had made that application, he said it was in 1999. That application had been granted. He had sent his passport and his birth certificate and it came through the post.

39. The claimant was asked why if he is now saying that he had lost his passport which had the ILR stamped in it when he moved in 1999, he said in his statement that he had lost his naturalisation certificate when he was arrested, to which the claimant's initial reply was that "when I was arrested everything was taken".

40. When it was put to him that that was in 2002, he then said that everything had gone missing when he moved home.

41. Mr Avery pressed the claimant as to why he had said initially that Customs and Excise had taken the documents, to which he replied that "they took a lot of documents".

42. The claimant was asked why he did not say he had lost the documents in 1999 when he had moved, to which he eventually replied that he had been "mixed up with the timings".

43. As it was the claimant's evidence that he had used a different solicitor to submit his application for naturalisation, he was asked whether he had tried to get in contact with this solicitor, to which the claimant replied that he had tried but he was in Mauritius now.

44. Mr Avery then asked the claimant why, when at an earlier stage he had applied for leave to remain on the grounds of his marriage he had not approached that solicitor then, to which the claimant replied that he had been "told to go to a bigger solicitor" so he had gone to Malik Law in Bethnal Green in East London.

45. When asked whether he had or had not gone to either solicitor he had been to before, the claimant said that he had called JR Immigration's office, just the once, but the person he had dealt with before was not there when he called, and he had not called back because having talked to his friends he had been advised to go to Malik Law because they were a well-known firm. When asked whether it occurred to him that his previous solicitors might have had a record of his application, the claimant replied that although they might have a record of what they had written he thought at the time that he should deal with the Home Office directly instead of incurring all the costs of dealing with a solicitor.

46. When asked why, having been unsuccessful with the Home Office he had not contacted his previous solicitors then, he replied that he had gone to a different solicitor who had advised him to apply on the grounds of marriage. They advised him that it would be very costly to pursue the Home Office if they had lost the documents and said that it would be a lot cheaper for him to do this by himself. He did not approach his previous solicitors to ask if they had a record of his documents because "in my mind the Home Office should have had a record".

47. In evidence the claimant had said that he had applied for a British passport, but it was pointed out to him in cross-examination that in his statement he had said, in his second paragraph that he had <u>not</u> applied for a passport. He agreed that what he had written was incorrect and the reason he gave was that "I forgot all about it".

48. It was also put to the claimant that when he had applied for a "no time limit" stamp to be put on his passport in 2011, at 1.7, where he was asked for his "nationality" he had answered "Mauritian". When asked why he had done this, the claimant said this was because the Home Office could not find his documents. When asked again why, if he did not think this was right, he had still given this answer, he repeated that it was because the Home Office could not find his documents.

49. At section 3.1, under "Personal History" within the 2011 application, the claimant was asked in terms whether he or any dependants applying with him "have any criminal convictions in the UK or any other country (including traffic offences) or any civil judgments made against you" to which he had ticked the box saying "No". When asked why he had ticked this box, given that he had in fact received a very long sentence of imprisonment, the claimant replied that this was because when he was in prison he had been told that he did not have to declare any convictions, except when he was working with children. When it was pointed out to him that immediately above this answer it was stated that it was "an

offence under Section 26(1)(c) of the Immigration Act 1971 to make a statement or representation which you know to be false or do not believe to be true" the claimant merely repeated that it was his understanding that he did not have to declare the previous conviction unless he was working with children or vulnerable people. He accepted, as he had to, that this was not stated on the form, and he also accepted that it was stated on the form that if he gave a false answer he would be committing an offence.

50. The claimant was then asked some questions about his children and also continued to deny that he had been guilty of the offence of which he had been convicted.

51. With regard to a letter dated 30 November 2013 which the claimant claimed to have sent to the Mauritius High Commission (an unsigned copy was produced) in which the claimant asks the High Commission to obtain the records of all passports he had travelled on, the claimant confirmed that he had not followed up this letter in writing. He said he had spoken to the High Commission in "early January" but was told that the person he needed to speak to was away and he had not followed this up.

52. The claimant's wife then gave evidence. She adopted her witness statement (at pages 4 to 6 of the claimant's bundle) in which she had said that her children would suffer if the claimant was removed and that she believed that her husband was innocent. At paragraph 15 of her statement, the claimant's wife had stated as follows:

> "15. It is now been alleged that my husband is not British. However this cannot be right. My husband's certificates and with other of our documents were taken away by the customs officers when they arrested him. They never returned them. In fact I was told that they caught fire and were destroyed. The person who took his documents does not work for Customs anymore."

53. There is no mention in this statement of any documents being lost in 1999.

54. While answering supplementary questions, Mrs S told the Tribunal that she worked for the Home Office in the detained fast track department. She had started working for the Home Office in 2000 and in their immigration department since 2006. She said that she was familiar with the asylum procedures and had been with the claimant when he had applied for ILR, but then she said that she had not been with him when he made that application, but she knew he had had ILR when they married because they had travelled together in 1998. They had gone to France in April, Spain in the summer and the claimant went to Mauritius in August where she joined him in September. Then they returned back to the UK in November 1998.

55. When asked whether she had seen the ILR stamp in his passport, she replied that she had and that she sometimes had his passport with her. She claimed to be "100% sure" of that.

56. When asked whether the couple were together when he applied for naturalisation, she said that they were but that she had not been involved in that application although she was aware he had made it. When asked when he had made it she said that it was probably in 1998 or 1999, she was not too sure but it must be after they had returned from Mauritius. She said that he was naturalised, because he had "received a certificate". She had seen it with her own eyes, which she believed, when asked, was in 1999. She knew it was a naturalisation certificate because she was naturalised herself. Again, she was 100% sure.

57. Mrs S told the Tribunal that if her husband was deported this would have a big impact on her children but she was sure he would not commit any other offences, because he was not that sort of person. She confirmed that she still did not believe that he had committed the offence of which he had been convicted either.

58. In cross-examination, Mrs S said that she had met her husband in 1997 and he must have had ILR when they met, because she knew he had it later when they travelled in 1998 and there had been no conversation between them about his applying subsequently.

59. When asked why there was no mention of the couple travelling in her statement, Mrs S said she did not know but that they had travelled together in 1998. When it was put to her that there was no mention of this in the claimant's statement either, she replied that the Home Office must have some record because they had filled in travelling cards at the time. They had also filled in landing cards, because at that time she did not have a British passport. When asked, Mrs S said that they did have some pictures, for example they had visited the Eiffel Tower in France in 1998, but it was correct that none of this evidence had been put before the Tribunal.

60. Mrs S was then asked what had happened to the claimant's documents, to which she replied that everything had been taken by Customs.

61. When asked to what documents she had been referring to at paragraph 15 of her statement, when she had said that the claimant's "certificate and with other of our documents were taken away by the customs officers when they arrested him" Mrs S said that she did not know what documents they took. She was not there and when she arrived home they had taken everything, her certificates, her passport and his passport.

62. When asked when she claimed to have seen her husband's naturalisation certificate, the witness said that she thought it was in 1999, but she did not remember the month. She had realised the document was missing in 2000, when they had planned to go to a wedding in France and needed to

travel. Because the claimant had a new passport, they had gone to Lunar House to get ILR endorsed on his new passport.

63. When asked why they had done this if the claimant was a British citizen at this time, she replied that this was "because he hadn't applied for a British passport by that time". They could not find anything.

64. When asked whether or not the claimant had made an attempt to apply for a British passport, she said that she thought he had but could not be sure when that was. She did not know, when asked, why he had not applied for a British passport instead of trying to get an ILR stamp. When asked whether she had discussed this with him at the time, she said that maybe she had but she did not recall.

65. When asked whether it would have been easier to travel on a British passport as an EU citizen, she at first said that this was not really so, because if they were planning to go to Mauritius he would still need ILR. She did not know whether it would be easier to travel on a British passport as an EU citizen.

66. When asked what steps they had taken as a couple to correct the situation and whether or not they had discussed going back to the solicitors who they said had dealt with the previous grant of ILR and the claimant's naturalisation application to see if they had any documents, the witness said she did not recall. She had been "very young at the time and had just started working at the Home Office" and "I didn't know anything about immigration". She claimed that they had just listened to what their solicitors had to tell them at the time. She eventually recalled their name as Malik. They had told the claimant that he should sue the Home Office but because she had just started working for the Home Office they did not wish to go down that route.

67. When asked again why she had said at paragraph 15 of her statement that these documents had been taken by customs officers, the witness had replied that she did not know what documents had been taken.

68. I record that at this point Ms Easty conceded that she was "not going to pretend there was not an apparent discrepancy in the evidence" although it would be her case that this had been dealt with in evidence before the First-tier Tribunal.

Submissions

69. I then heard submissions on behalf of both parties. On behalf of the Secretary of State, Mr Avery accepted that at some stage an erroneous check had been carried out which suggested that the claimant was a British national, but that numerous checks had been made since and there was not the slightest bit of evidence produced to suggest that in fact he was. Furthermore, despite this being a key factor in the case, no further evidence had been put in on behalf of the claimant to support his

contention that at any stage he had either been granted ILR or had been granted British citizenship. Also, even though it was the evidence of the claimant's wife that they had had documents enabling them to travel, no evidence regarding this had been put in either.

70. The claimant claimed that he had had a further passport issued to him after the passport which was exhibited at D1 of the main bundle onwards, into which his ILR stamp was placed, but he had produced no evidence of this. Nor had he produced evidence from either of the two solicitors he said had worked for him, and so had not satisfied the burden of proof that he had British nationality.

71. With regard to the evidence of the claimant's wife, either she was not telling the truth or what she had been shown which she believed indicated that the claimant had British citizenship was not a genuine document. Also, with regard to her evidence, it is hard to understand why if the claimant had indeed been granted ILR previously or had British citizenship he should have made a subsequent application for ILR, rather than taking steps to confirm what they both now said his true position had been. The Secretary of State had made enquiries to establish whether there was anything in her records to suggest that enquiries had been made, but no records existed to show that they had, which simply beggared belief.

72. With regard to Article 8, and whether removal would be proportionate, the Tribunal had heard the evidence and could make its own mind up. Although the claimant might present a low risk of re-offending, he had not accepted responsibility for his actions and also had shown by stating on his application that he had no previous convictions, that his evidence could not be relied upon. Although there was nothing to suggest that he was not participating in family life, his crime in this case was extremely serious and his removal would be proportionate even if one of its consequences was the break-up of his family.

73. On behalf of the claimant, Ms Easty referred to the "bad old days in the 1990s" when Home Office files regularly went missing, but (as Ms Easty asserted) "we know that the sentencing remarks say he was a British citizen". However, when asked by the Tribunal to show where in the sentencing remarks this had been said, Ms Easty accepted that this had not been said within the sentencing remarks. Ms Easty then referred to an email which is at page 54 of the claimant's bundle in which reference had been made by a Home Office official to a Jaysen S who was said to be a British citizen, and enquiries made in 2007/2008 had apparently concluded that this claimant was a British citizen, which was why no attempt had been made to deport him at that time. It was asserted that no action had been taken for a number of years because during these periods the Home Office had accepted that the claimant was a British citizen and it was unclear where the Secretary of State had got this information from.

74. In answer to a question from the Tribunal as to whether or not it was correct that no request had been made on behalf of the claimant for the

Secretary of State to state where she had got this information from, Ms Easty replied that she would have requested it, but she had not looked at this evidence before this hearing. The Home Office were saying in the past that the claimant had been a British citizen and the Tribunal had the benefit of the evidence of the claimant and his wife, and it was also very significant evidence that the claimant's wife said she had seen the relevant documents.

75. With regard to Article 8, although it was a serious offence, the claimant had been assessed as representing a low risk of re-offending. With regard to the consideration of Article 8 under the Immigration Rules, while the claimant would have to demonstrate that there was no other adult who could care for the children, it was her submission that "care" in this context meant the best care that the child would require and it was her case that these children would not be properly cared for under the Rules without the care of both parents, including their father. Without his presence, they would not be cared for to the same level as before, and accordingly there was not an appropriate adult who could care for them to the same level.

76. In answer to a question from the Tribunal as to why if her submission was correct the Rules did not refer to "primary carer" Ms Easty submitted that in terms of Article 8 simpliciter, the law was in disarray.

77. With regard to the claimant's assertion that he had been given ILR, he might well have got settlement by working, or as a commonwealth student resident in the UK because we did not know if his parentage or grand-parentage were British.

Discussion

78. I have referred above to a considerable amount of the evidence which was given by the claimant and his wife and the way in which they answered questions in cross-examination because in the circumstances of this appeal I consider this evidence relevant to the decision I have to take as to whether or not this evidence is credible. The onus is on the claimant to establish on the balance of probabilities that he is a British citizen (such that he cannot be deported) but I am not only unpersuaded to that degree that he is, but I am indeed convinced to a high degree of probability that he is not. Having set out the evidence and submissions so fully above, I can summarise my reasons for so finding, which I do below.

79. I start by taking account of the chronology.

80. It is common ground that the appellant first entered this country in 1991, when he was 19, and that his visa was extended on several occasions until 1996. As already noted, it is not entirely clear what happened subsequently, because the Secretary of State contends there was evidence that the claimant had left the UK in August 1995 to visit Mauritius but there was no record of his having re-entered the UK. There

are also oddities within his earlier Mauritian passport, issued in 1990, which were referred to at paragraph 2 of Judge McKee's decision.

81. In any event, following various grants of student leave, it is the claimant's case that in 1997 he was granted indefinite leave to remain. Although his Mauritian passport, which had been issued in 1990, was apparently valid for ten years, and the claimant was issued with another passport in 2000 which says on its face that it was valid for ten years, there is no stamp on the passport issued in 1990 showing that ILR was granted in 1997. The claimant's explanation now is that he had applied for a new passport by then, which has subsequently been lost. No evidence has been put before the Tribunal from the authorities in Mauritius to support the contention that this claimant was ever issued with such a passport.

82. On the claimant's case, having been granted ILR in 1997, he received his naturalisation certificate, confirming that he was now a naturalised British citizen in 1999. However, he no longer had this document either, because (according to the statement he made in May 2013) this document had been taken from his house by Customs and Excise after his arrest in 2002. The next important date in the chronology is 2001, when, notwithstanding that it is the claimant's case that he had been granted ILR in 1997 and been naturalised as a British citizen in 1999, the claimant made a further application for leave to remain on the basis of his marriage in that year. Clearly, this calls for some explanation, as, without good explanation, it is astonishing that this application was made if indeed by that time the claimant was a British citizen. This is all the more surprising as in his statement which was made for these proceedings in 2013, the claimant had stated that he had lost his naturalisation certificate when it was taken with other documents by Customs and Excise in 2002 (which if correct means he would still have had it in 2001 when his further application for leave to remain was made).

83. There are other aspects of the claimant's case which call for explanation, and it is because these aspects are so important that I have recorded so much of his cross-examination above.

84. In a statement which the claimant made on 18 November 2012, in which he stated that he had applied for ILR in 1997 which had been granted and then in 1999 had applied for naturalisation, following which he had received a certificate from Liverpool, he stated that "however I did not apply for a British passport". In that document, he claims to have misplaced his documents in late 1999, and says that it was then that he reapplied for a new passport. In that letter, he does not attach any extracts from what he now says was a five year passport issued in 1990. Nor does he make any mention of having renewed his passport before the expiry of its ten year term because technology had changed (the explanation apparently given to the First-tier Tribunal panel to explain why he had the 1990 passport but no longer had the passport which he claimed covered the relevant years, as set out at paragraph 5 of the

panel's determination, referred to above). In light of the claimant's statement that he had not applied for a British passport, his answer in cross-examination that he had applied for a British passport in 2000 is also clearly inconsistent.

85. The absence of any evidence from the authorities in Mauritius is significant. Although the claimant produced a letter he claimed to have written to the High Commission on 30 November 2013, in which he asked for any records they might have in respect of his various passport applications, in cross-examination, he confirmed that he had not followed this up. He claimed that when he had spoken to the High Commission in "early January" he had been told the person he needed to speak to was not available, because he was away. Given the importance of this evidence, I am unable to accept this explanation. If the claimant had indeed obtained a new passport before 1997 (either because his earlier passport had expired after five years or because owing to new technology he decided to obtain a new passport, depending on which of his inconsistent explanations was accepted, if either) it is not credible that he would not have taken any steps he could to obtain confirmation of this from the Mauritian authorities. The fact that he has not even attempted to obtain this information would be extraordinary if there was any truth in his story.

86. As already noted above, when asked to explain how it was that he had said in an earlier statement that he had not applied for a passport but had said in cross-examination that he had, the best answer he could give was that he had forgotten about it. Again, I did not accept this answer. If he had applied for a passport, as he now claims, he would almost certainly have followed this up when the passport did not arrive, and in those circumstances this is not something he would have forgotten about. Nor would his wife, who has also claimed to have been aware of his immigration position at this time.

87. Clearly, if the claimant's position was true, there were a number of solicitors who might have been in a position to confirm this. Apparently, according to the claimant's account, different solicitors had made the application for ILR and his application for naturalisation. However, for different reasons, neither was available. On this aspect of his case as well the claimant's evidence was entirely unconvincing. He at first claimed that he could not get hold of the person who had been dealing with his application for ILR at JR Immigration, and that the different solicitor who had submitted his application for naturalisation was now in Mauritius. However, that does not explain why he had not obtained evidence from either solicitor in 2001, instead of making a fresh application for ILR. The explanation he now gives is that he had been advised to go to Malik Law because they were a well-known firm, but there is no evidence from that firm either. In the event, according to the claimant he made the application himself, because it would be a lot cheaper than using Malik Law. In these circumstances, it is all the more unbelievable (when assessing whether the claimant's account should be believed) that he did

not at that stage seek further information from either of the solicitors who had been involved earlier, because their evidence could have been crucial in establishing first that he had been given ILR in 1997 and secondly that he had been naturalised in 1999.

88. With regard to the claimant's evidence generally, he has, as noted above, continued to deny that he was guilty of the offence of which he was convicted. While, as the Court of Appeal noted in *AM* [2012] EWCA Civ 1634, there may be many reasons why a guilty person continues to deny his guilt, and the fact that a person continues to deny his guilt does not necessarily mean that he presents a high risk of reoffending, this does not inspire confidence that he is a witness of truth. Further, when making his application for a "no time limit" stamp to be put on his passport in 2011, when asked for his "nationality" at 1.7, he had answered "Mauritian". His answer, when questioned, was that this had been because the Home Office could not find his documents, begs the question of why he had not stated what he claims to be the true position, which is that he is a naturalised British citizen. If this was true, that is what should have been stated at the time. Furthermore, at Section 3.1, under "personal history" within this application, in answer to the question as to whether he had "any criminal convictions in the UK or any other country (including traffic offences)..." he had ticked the box saying "no" which was plainly untrue. The reason he gave, which was that he had been told when in prison that he did not have to declare any convictions, except when he was working with children, does not explain why he gave this answer to that question in circumstances where immediately above it was stated in terms that it was an offence to make a statement which was known to be false or which the maker did not believe to be true. Clearly his answer was not true, and I do not accept his explanation as to why he did not tell the truth on this form.

89. With regard to the evidence of the claimant's wife, who says that she remembered seeing his passport which he now claimed to have lost, containing the ILR stamp which he says he had, her evidence had been that this document had been taken away by customs officers and she had been told that the documents taken had either caught fire or been destroyed, and there was no mention in the statement which she had previously made of any documents being lost in 1999.

90. When asked why in 2000 the couple had gone to Lunar House in order to get ILR endorsed on the claimant's new passport, if indeed the claimant was a British citizen at this time, she replied that this was "because he had not applied for a British passport by this time" but she was unable now to say whether or not he had made any attempt to apply for a British passport, or if he had when that was, or why he had not applied for a British passport instead of trying to get an ILR stamp.

91. As already noted above, even Ms Easty, representing the claimant was obliged to concede that she could not pretend that "there was not an apparent discrepancy in the evidence".

92. While the evidence submitted on behalf of the claimant (including the evidence given by his wife) contains so many glaring inconsistencies, other than that the Secretary of State on a previous occasion acted on the basis that the claimant was a British citizen and Mrs S says that she believes she saw an ILR stamp in a passport which is now lost, there is no evidence corroborating the claimant's account. The Secretary of State has carried out extensive checks but has been unable to find any evidence supporting the claimant's contentions either that he was granted ILR in 1997 or that he was a naturalised British citizen in 1999. The conduct of the claimant has, as indicated above, been consistently inconsistent with his having either been granted ILR or been naturalised. Evidence which should have been available had his account been true has not been adduced and the explanations given by and on behalf of the claimant have been inconsistent and not believable.

93. It is, of course, incumbent on the claimant to establish his case, on the balance of probabilities, but in my judgment he has not come close to this. Having considered all the evidence in the round, I do not believe that he was granted ILR in 1997 or that he was naturalised as a British citizen in 1999. I do not accept his explanation as to why it was that he applied for ILR after apparently been naturalised as a British citizen or why it is that at no stage has he made any serious attempt to obtain evidence from those who, if his evidence was truthful, could have assisted him, in particular the authorities in Mauritius and his former solicitors, who may have been able to provide evidence of the applications he says they made on his behalf. I also consider that the reason why the claimant was so vague as to what the basis was on which the application for ILR was apparently made in 1997 is that no such application was made. For the avoidance of doubt, having considered the evidence given by both the claimant and his wife, I am not satisfied to the requisite standard of proof that either are witnesses of truth.

94. For the reasons I have given, I am not satisfied that the claimant has established that he is a British citizen, and accordingly his appeal cannot succeed on that ground.

95. I accordingly turn now to consider the claimant's argument that his deportation would not be proportionate for Article 8 purposes. I deal first of all with Ms Easty's argument that although under the Rules the claimant would have to demonstrate that there was no other adult who could care for the children, "care" in this context meant the best care that the child would require which meant the care of both parents including their father. In making this submission, Ms Easty contended that the law was "in disarray" regarding this point. In my judgment, this is simply unarguable. The Rules are clear, and the children can go on being cared for by their mother, as they were while the claimant was in prison.

96. I do not need to set out the jurisprudence in any great detail. As the Court of Appeal found in *MF (Nigeria)* [2013] EWCA Civ 1192 the Tribunal first has to consider whether or not the deportation of this appellant would

be disproportionate within paragraphs 398, 399 and 399A of the Rules. The claimant does not come within the provisions of these Rules, and it is not arguable that the children cannot be properly cared for unless both parents are present in this country. If that is what the Rules had intended to say, they would have said so.

97. As is made clear by the Court of Appeal in both *MF (Nigeria)* and *SS (Nigeria)* [2013] EWCA Civ 550, although the Tribunal must then consider whether or not outside these provisions it was still arguable that the deportation of an applicant was disproportionate, the cases where this would be found to be so would be very rare and the arguments to support such a finding would have to be very compelling. My starting point in this case (where the automatic deportation provisions apply) has to be the extreme seriousness of the offence of which the claimant was convicted, for which he was sentenced to fifteen years' imprisonment. This offence is so serious (involving large-scale importation of very dangerous drugs) that for reasons of general deterrence as well as the expression of the revulsion of the public towards offences of this kind, it is very much in the public interest to deport those foreign criminals convicted of such offences. While there is clearly a family life between the claimant and the children, as Sedley LJ acknowledged in *AD Lee* [2011] EWCA Civ 348 (at paragraph 27) one of the consequences of deportation is that in cases such as this, a family will be split up, because "that is what deportation does". The public interest in deporting this claimant is so great that even though his deportation will involve the break-up of his family, this factor does not outweigh the legitimate public interest in his deportation. Even the First-tier Tribunal panel, which allowed his appeal, acknowledged that on this aspect of the case, the factor which it considered tipped the scales was that he was, in their judgment, a naturalised British citizen, which finding has been set aside. The claimant has not, in my judgement, established that the consequences of his removal would be "unjustifiably harsh". Although the consequences might be regarded as "harsh" (in that his family will be split up) this is not "unjustifiable" in the context of his extremely serious offending.

98. It follows that the claimant's appeal must be dismissed, and I so find.

Anonymity direction

99. An anonymity direction has previously been made, and no application has been made to discharge this direction. Accordingly, no report can be published which identifies Mr S or his family.

Decision

I set aside the decision of the First-tier Tribunal panel as containing a material error of law and substitute the following decision:

The claimant's appeal is dismissed, on all grounds.

Signed: Dated: 25 July 2014

Upper Tribunal Judge Craig